No. 10279

2

United States

Circuit Court of Appeals

For the Ninth Circuit.

CUMMER-GRAHAM COMPANY, a corporation,
Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION,
Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

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IN the District Court of the United States
for the District of Idaho,
Southern Division

No. 2152

THE STRAIGHT SIDE BASKET CORPORATION, a corporation,

Plaintiff,

vs.

CUMMER-GRAHAM COMPANY, a corporation,

Defendant.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAD JURISDICTION AND THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT.

Appellant, the defendant below, has maintained from the beginning, that the District Court had no jurisdiction. Appellee, the plaintiff, below, asserts that it had. The parties will be referred to as plaintiff and defendant, the positions they occupied below.

The complaint alleges that plaintiff is a Michigan corporation, and defendant a Texas corporation, and that the matter in controversy exceeds $3,000 (p. 2). The defendant has not controverted these facts. Summons was served in Idaho upon C. H. Kinney as defendant's Salesmanager (p. 6).

The claim for which relief was sought was for royalty payments under license agreements for patented ma-

chinery leased to defendant (p. 21). There is no allegation that the manufacturing was done in Idaho, but merely that some of the manufactured product was sold in Idaho (p. 23), but the evidence showed that although Idaho was an important market, it was not the largest market (pp. 64 and 65).

Defendant filed motion (a) to dismiss on the grounds that the action had been brought in the wrong district (p. 6) and (b) to quash service of summons because the service of summons did not constitute proper service (p. 7). Affidavits and counter affidavits were filed in support of and in opposition to said motions; depositions were taken and the amount prayed for (which at all times was in excess of $3,000) was increased by amendments filed by leave of Court asserting indebtedness later alleged to have accrued. The Court overruled the motion to dismiss on both grounds (p. 33). Defendant answered, refusing to plead to the merits (p. 36) and denying that it at any time had done or was doing business in Idaho (p. 34); that it had not qualified to do business therein (p. 34), and that the venue was improper (p. 34); and denied facts which plaintiff had alleged as grounds for jurisdiction (pp. 34 to 36). A motion for summary judgment was filed (p. 37) and granted, and judgment for the amount sought against plaintiff was entered (pp. 42, 43).

The action being between citizens of different states and involving more than $3,000, the subject matter is within the jurisdiction of the United States Courts under 28 U.S. Code, Sec. 41. Plaintiff asserted that it was within the jurisdiction of the United States District Court for the District of Idaho. Defendant asserted that

the venue in such court was improperly laid and that it was not within such Court's jurisdiction. The applicable statute is 28 U.S. Code, Sec. 112:

> "Except as provided in Sections 113 to 118 of this title, no civil suit shall be brought in any District Court against any person by an original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

This Court has jurisdiction to review the judgment under 28 U.S. Code, Sec. 225 (a) First.

CONCISE ABSTRACT AND STATEMENT OF THE CASE PRESENTING SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The plaintiff is a Michigan corporation, and the defendant a Texas corporation. Defendant contends it is not subject to suit in the United States District Court for the District of Idaho, because Idaho is the residence of neither the plaintiff nor the defendant, and further that service upon the alleged Agent served was not proper service. Plaintiff contends that the defendant was doing business in Idaho, and thereby waived the privilege of objecting to the venue as laid. Defendant contends that it was not doing business in Idaho and hence the privilege of objecting on the ground of improper venue was not waived; and that even if it were so doing business,

the privilege of making such objection was not waived; and that service of process was not properly made. Accordingly, the primary issues are:

1. Was the venue properly laid in the United States District Court for the District of Idaho?

2. Was service properly made upon defendant by service upon its Salesmanager, then in Idaho?

There is no substantial controversy as to the facts. Except as to certain details, what the defendant did or did not do relative to whether or not it was doing business in Idaho is not in dispute. The question is:

1. Even if defendant were doing business in Idaho, does such constitute a waiver of the privilege of objecting to the improper venue?

2. Do the facts establish as a matter of law that the defendant was doing business in Idaho?

3. Was service properly made upon defendant's Salesmanager?

Plaintiff maintains, and the Court held, that all of these questions should be answered in the affirmative. Defendant maintains that all should be answered in the negative, and that the Court's ruling was erroneous. If any question should be answered in the negative the judgment below should be reversed. These questions were presented by the motion to dismiss (pp. 6 and 7) by the answer (pp. 33 to 36) and by plaintiff's motion for summary judgment (p. 37). The ruling upon each was in favor of plaintiff's position.

No matter of fact asserted by defendant has been di-

rectly denied by plaintiff. Only the legal effect thereof is in controversy. The material facts are few and simple, and will be stated in logical order rather than in the order in which they appear in the record.

Cummer-Graham Company is a Texas corporation with its principal office in Paris, Texas (pp. 48, 192, 206). Among other products, it manufactures baskets used for the shipment of fruit. It has bought at times baskets from other manufacturers, but in 1940 and 1941 none were bought for sale in Idaho (p. 64) except that there is a record of one purchase from a manufacturer in Georgia (p. 204). Its largest sales are in Texas (p. 64). Idaho and Colorado constitute the largest western market (p. 65). These two states purchase about equal amounts (p. 65). The Board of Directors in Texas controls general policies (p. 54). At the time this action was commenced on October 21, 1941, it had no office in Idaho (p. 9), and never had had any office there except at one time for less than three months (p. 80) in 1940 or earlier (p. 79) which was at least one season prior to the commencement of this action when one of its then salesmen had an office in its distributor's warehouse in Payette (p. 80). It carried no stock of merchandise in Idaho (p. 34), and except as above had no office there (p. 51). It had not qualified as a foreign corporation in Idaho, and had appointed no Agent for service of process in accordance with the Idaho statute (p. 34). Its Salesmanager who covered Idaho and twenty-six other states (p. 46), did not spend over sixty days in any one year in Idaho (p. 36). The Salesmanager was not an officer nor a Director of the company (pp. 36, 47). He assisted local distributors in sales work (p. 46). Sometimes he

received checks on accounts receivable which he forwarded to the defendant's principal office in Texas (p. 55). He never was directed and never had authority to make adjustments of accounts (p. 96) nor to pass upon credits or contracts (p. 69). Credits were approved at the defendant's principal office, generally in advance of his trips. In other years other representatives had been in Idaho on company business (p. 56) but in October, 1941, C. H. Kinney was the only one. All orders had to be approved at the office in Paris, Texas (pp. 54, 94, 192, 193). The policies were approved at the beginning of the season by the directors in Paris, Texas, and any change had to be approved by them (p. 54). All orders were filled by shipment into Idaho from other states (pp. 34, 35, 70, 71). Plaintiff attempted to show that some shipments were made to growers, but the instances mentioned were in reality sales handled through one of the distributors (pp. 96, 97). What difference it would have made whether a sale was to a distributor or to a grower has not been indicated by plaintiff. At any rate, under the rule hereafter to be discussed, the evidence most favorable to the party against whom a summary judgment is entered must be accepted as true. Such contracts as were made with Idaho customers were signed by the customers, apparently in Idaho, but were forwarded to Texas for signature by defendant's officers (p. 177) and under well established rules, such contracts would thus have been made in Texas, not in Idaho.

The defendant contended that the plaintiff was doing business in Idaho at the time of the commencement of the action on account of the following facts:

The plaintiff made sales in Idaho in the following

manner: Prior to 1936 the plaintiff and other Texas manufacturers sold their products through the Baskets Sales Company. That company ceased operations, and the plaintiff handled its own sales. Its sales were, except for a few shipments made through two distributors, Reilly Atkinson of Boise, and F. C. Hogue of Payette (p. 55). Although sometimes referred to as "Agents" they were in effect wholesale distributors. The word "Agent" as applied to them did not mean Agent in the legal sense, but meant "customer" (pp. 34, 72, 73). Distributors would sell in turn to other customers, either the growers or packers of the fruit which would be shipped in the containers. Defendant in 1941 did not sell any baskets to growers (p. 63). A few sales to growers were shown in other years. Defendant's representatives would assist the distributors in making sales to their customers (p. 46). The distributors received 7% of the price ultimately paid by their customers (p. 138). A few cases were shown prior to 1941 of sales apparently made by plaintiff to others without going through the distributors, but no such sales were shown in 1941. The distributors assumed their own credit risks (pp. 107, 117).

Due to the fact that fruit is perishable and must be moved quickly when ready for shipment (p. 70), and that requirements for containers could not be exactly known in advance (p. 77), it was the practice for plaintiff to ship cars of baskets from Texas (pp. 70, 71) and in one instance from Georgia (p. 204) which distributor F. C. Hogue received (p. 155). These cars would be consigned by defendant to itself in care of one of its distributors, either Reilly Atchinson Company or F. C. Hogue (pp. 67, 86) at some Idaho point, usually Nampa.

None of these cars were delivered to defendant (pp. 35, 50) and there was no knowledge of any practice of consigning any car except in care of a distributor (pp. 133, 134). These cars, commonly called "rollers" (p. 70), might then be diverted by the customer to some other point where the customer would accept delivery, or with his consent (p. 75) if he wished the car to go direct to his customer. If the distributor happened to be overloaded, the car would be sold to the other distributor either at the destination to which the car had been consigned or at some other point (p. 113). There was no evidence of a car being opened, or of any interruption in the interstate shipment. Efforts were made to avoid demurrage (p. 115) which indicates continuous travel of the car and no use of the car for warehousing purposes. Sometimes a car consigned to a destination in Washington would be stopped in Idaho (p. 122), all depending upon the requirements of the particular distributors and the packing of the crops at particular points (pp. 113, 114, 115). Sometimes this diversion was handled by defendant at its Texas office. Only if the sale and credit had previously been approved by defendant's Board of Directors, would defendant's representative, if in Idaho, authorize a diversion (p. 72). When a car left Texas consigned to plaintiff in care of one distributor, the car was charged on plaintiff's books to the distributor (pp. 71, 86). If he eventually took the car, the charge remained. If the other distributor took the car, the first distributor was credited and the other distributor was charged with the amount (p. 71).

In the event that one distributor bought a larger amount of baskets than could be sold during the season,

it was often customary for such baskets to be carried over until the next season (p. 87). The distributor, in said case, held the baskets in his warehouse and paid all storage and insurance charges (pp. 62, 87, 125). While the charge for purchase price of such baskets remained unchanged, and the account was still owing, it was the custom of plaintiff to carry the account receivable until the following season under a good faith agreement whereby the baskets would stand as collateral security but there would be no chattel mortage executed (p. 61). During the next season the baskets would be sold by the distributor, and the account paid. There was considerable confusion in the testimony as to whether or not the baskets belonged to defendant (p. 126) and as to what the situation would be if a fire destroyed the baskets or the price changed, whether remittance would be made on the old or on the new price. The final answer obtained was that it was not known because it had not happened (pp. 62, 129, 130, 139, 140). Any doubt as to the effect of the situation, as above stated and as will hereafter be shown must be resolved in favor of the construction which favors defendant. This rule is emphasized by the further fact that the witnesses whose depositions were taken regarding this situation were plaintiff's witnesses and plaintiff is in no stronger position of certainty than their uncertainty as to the effect of their arrangement. The failure of plaintiff's own witnesses to produce a contract, setting forth the definite arrangement indicates that the plan was a matter of custom or verbal understanding rather than any written agreement.

When a shipment is made from Texas to a distributor in Texas whether by roller car or otherwise, the freight is not prepaid but is paid by the distributor upon accepting delivery in Idaho (p. 138). The 7% commission is computed upon the ultimate sale price less the freight (p. 138).

When the Basket Sales Company discontinued business, F. H. Hogue (not F. C. Hogue (p. 60) the distributor above named) was indebted to the Basket Sales Company (p. 58). This indebtedness in 1938 was placed in the form of a promissory note payable to the order of J. A. McGill, the President of plaintiff, and was secured by a mortgage on real estate in Payette County, Idaho (p. 147). F. H. Hogue then executed an instrument subject to above mortgage (p. 147) to secure his other creditors to C. N. Kinney, the father of C. H. Kinney (p. 56), plaintiff's Salesmanager, but who at no time was connected with plaintiff (p. 57). This instrument although referred to as an assignment for benefit of creditors (p. 57) was in the nature of a mortgage of F. H. Hogue's equity in the property of a Trustee for the benefit of theretofore unsecured creditors (p. 197). C. N. Kinney operated the property but leased the property secured by the McGill mortgage to McGill during the Year 1941. Upon the death of C. N. Kinney, Scott Brubaker was appointed Trustee in place of C. N. Kinney (p. 78) by the District Court of Payette County, Idaho. The defendant had no interest in this property (pp. 57, 59), did not sign the trust agreement (p. 57) and it did not appear as an asset upon its books (p. 92).

SPECIFICATION OF ERRORS RELIED UPON

The errors relied upon all relate to the same general issue. (a) Was defendant doing business in Idaho at the time of the commencement of the action? (b) If so, does such fact constitute a waiver of the privilege of objection to the improper venue? and (c) was defendant properly served with summons. Since the Court made several rulings at different stages of the proceeding, the errors relied upon are as follows:

1. The Court erred in overruling defendant's motion to dismiss.

2. The Court erred in denying defendant's motion to squash service of summons.

3. The Court erred in granting motion of plaintiff for summary judgment.

4. The Court erred in entering judgment against defendant in favor of plaintiff on September 1, 1942.

ISSUES

Under the language of 28 U.S. Code, Sec. 112, the proper venue of an action between citizens of different states is clearly and unambiguously set forth as the district of the residence of either the plaintiff or the defendant. The district of Idaho is clearly not such district and under the earlier decisions the right to dismissal would have been clear. Plaintiff however contends that later decisions have held that a corporation domiciled in one state which does business in another state submits itself to the jurisdiction of the courts of that state which include the Federal Courts, and that

such doing business constitutes a waiver of the privilege of having the venue laid in the district of residence of either the plaintiff or the defendant.

The issues accordingly are:

1. Does the doing of business in a state without qualifying as a foreign corporation constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in such state?

2. Under the facts in this case was defendant doing business in Idaho?

a. Does solicitation by an unqualified foreign corporation of orders within the state to be confirmed outside of the state for sales of merchandise to be shipped in interstate commerce into the state constitute the doing of business in the state?

b. Does the collection by a foreign corporation of its accounts receivable in the state constitute the doing of business within the state?

c. Does the shipping of goods by a foreign corporation in interstate commerce into the state to be sold on consignment with title retained by the consignor constitute the doing of business within the state?

d. Does the holding by a foreign corporation of security or some interest in real estate as an incident to collecting an account receivable or to the sale of merchandise constitute the doing of business within a state?

3. Was service properly made upon the defendant?

The defendant asserts that all of said questions must be answered in the negative. If either of the first two main issues shall be answered in the negative, the granting of the motion for summary judgment was error and the motion to dismiss should have been granted. If the third issue should have been answered in the negative, the motion to quash service of summons should have been granted.

Before entering upon the main argument, it is important to state

THE RULE APPLICABLE TO SUMMARY JUDGMENTS.

The motion for summary judgment by its terms (p. 37) raised only questions of law and was in effect a motion for judgment on the pleadings under the former procedure. The motion can be granted only if there is no controversy as to facts. Therefore as to details in the facts where there is some discrepancy or uncertainty, the position most favorable to the party against whom the summary judgment is sought to be entered must be accepted as true. If there is any uncertainty it was error to grant the motion. This is the holding of *McElwain v. Wickwire Spencer Steel Co.,* 126 F(2d) 210, 211, decided in 1942 wherein the Circuit Court of Appeals for the Second Circuit said:

> "With the material fact as to whether or not the appellant had been exposed to a dust hazard during the time he worked for the appellee after September 1, 1935 left as uncertain as it was, it was error to

> grant the motion for summary judgment. Rule 56(c) F.R.C.P. provides for the entry of a summary judgment 'if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Where there is a substantial dispute as to a material fact it cannot be said that the only issue is one of law. Houghton Mifflin Co. v. Stackpole Sons, Inc., et al., 2 cir., 113 F. 2d 627; Whitaker v. Coleman, 5 cir., 115 F. 2d 305; Miller v. Miller, App. D.C., 122 F. 2d 209.''

Accordingly, where there is any discrepancy or uncertainty, the doubt must be resolved in favor of defendant, and any evidence supporting defendant's position must be accepted as true.

THE DOING OF BUSINESS IN A STATE WITHOUT QUALIFYING AS A FOREIGN CORPORATION DOES NOT CONSTITUTE A WAIVER OF THE RIGHT TO OBJECT TO IMPROPER VENUE IN AN ACTION BROUGHT TO ENFORCE A CONTRACT NOT MADE IN AND NOT TO BE PERFORMED IN SUCH STATE.

The language of 28 U.S. Code, Sec. 112, clearly states that an action in the United States Courts lies only in the district of the residence of either the plaintiff or the defendant. This provision at one time read that the venue might be laid in the district where the defendant might be found. Cases under such statute are therefore not in point, but since 1888 the statute has confined the

venue to the residence of either that of plaintiff or the defendant. The case of *In Re Keasbey and Mattison Company,* 160 U.S. 221, 231; 16 S.Ct. 273, 40 L.Ed. 402 States:

> "The defendant cannot be compelled to answer in a district of which neither the defendant nor the plaintiff is an inhabitant. The objection, having been seasonably taken by the defendant corporation, appearing specially for the purpose, was rightly sustained by the Circuit Court."

Such has been the law in all cases until the Supreme Court in the case of *Neirbo v. Bethlehem Ship Building Corporation,* 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167 held that by qualifying as a foreign corporation and *appointing* agent for service of process, the corporation consented to be sued in all the courts of the state, which term includes the U.S. Courts. The facts before the Supreme Court limited the waiver to such cases as by *express appointment* consent to be sued was given. The Supreme Court not having before it any other facts and therefore not having extended the doctrine further, and the earlier decisions of the court having held that the doing of business did not constitute a waiver, the rule of the earlier decision still stands in cases where there has been no appointment of an agent.

Another limitation upon the scope of the Neirbo rule is evident from the facts which appear more fully in the opinion of the Circuit Court of Appeals 103 F (2d) 765, 766 when the case was before that court. The facts as there stated indicate that the action was brought in a United States Court sitting in New York to enjoin the

sale of property located in New York. The Supreme Court therefore was not called upon to decide whether it would overrule its former decisions holding that consent given by a foreign corporation to be sued in a state other than that of its domicile constituted consent to be sued only upon causes of action arising in such state. Such rule therefore still stands as it is expressed in *Old Wayne Life Assn v. McDonough,* 204 U.S. 8, 22; 27 S.Ct. 236, 51 L.Ed. 345, wherein the court said:

> "Conceding then that by going into Pennsylvania, without first complying with its statute, the defendant association may be held to have assented to the service upon the Insurance Commissioner of process in a suit brought against it there in respect of business transacted by it in that Commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania. Indeed, the Pennsylvania statute, upon its face, is only directed against insurance companies who do business in that Commonwealth—'in this State.' While the highest considerations of public policy demand that an insurance corporation, entering a State in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it, it would be going very far to imply, and we do not imply, such assent as to business transacted in another State, although citizens of the former State may be interested in such business."

The claim for relief here is to enforce an alleged liability for royalties due under a contract not made in Idaho, and not to be performed in Idaho. The fact that part of the revenue from which plaintiff might expect payment of royalties, if due, was derived from Idaho sales does not change the place where the alleged contract was made, nor where it would be performed by payment. Payment, if due, would be in Texas or Michigan, not Idaho. Accordingly, the defendant, even if it were doing business in Idaho has not waived its right to object to the venue of an action brought in Idaho upon a claim upon an alleged contract not arising in and not to be performed in Idaho.

Even had the decision of the Supreme Court in the Neirbo case or otherwise gone so far as to hold that the doing of business in a state constituted an implied waiver of the privilege of objecting to improper venue,

UNDER THE FACTS OF THIS CASE DEFENDANT WAS NOT DOING BUSINESS IN IDAHO.

The first step in considering this proposition is to examine the facts. In examining the facts it will be found that except in a few matters the plaintiff and defendant were in agreement as to what the defendant did. They were not in agreement as to the effect of such actions. Where discrepancies or uncertainties exist the statement of facts hereinafter set forth, accepts as true the fact most favorable to the defendant. Had there been a trial on the merits, the rules would have been otherwise, because such evidence as would support the finding of the Court would be accepted as true. How-

ever, as above shown, the rule is different where, as here, a motion for summary judgment was granted based upon the pleadings and depositions, and without a trial.

The activities in Idaho in which defendant was engaged are as follows:

1. Its representatives solicited in Idaho for sales of merchandise to be shipped in interstate commerce from other states into Idaho after approval at defendant's principal office in Texas.

2. It shipped merchandise in interstate commerce into Idaho consigned to itself or to its customers, and before delivery and while still in the original freight cars it sometimes diverted such interstate shipments to its customers in Idaho other than the original consignee.

3. It collected accounts receivable due to it.

4. It permitted postponement of payment upon accounts receivable due to it from its customers until such time as the customers should sell such merchandise in the following season, under an arrangement whereby all insurance, storage and carrying charges were paid by the customer, and which it is contended by plaintiff should be construed as the sale of goods on consignment with title retained in defendant.

5. Defendant's President held a note secured by mortgage upon land in Idaho as security for a debt in which there was no evidence showing that defendant had any interest in the security, and concerning which the only evidence was that it held no such interest.

DEFENDANT WAS NOT DOING BUSINESS IN IDAHO AT THE TIME THE ALLEGED CLAIM AROSE OR AT THE TIME OF THE COMMENCEMENT OF THE ACTION.

The solicitation in Idaho of orders to be confirmed outside of Idaho and filled from shipments to be made from outside of Idaho, does not constitute doing business in Idaho into which the goods are shipped. The question of whether or not the defendant was doing business in Idaho is to be determined from the decisions of the highest court of that state under the rule of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 78; 58 S.Ct. 817, 82 L.Ed. 1188.

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no Federal general common law."

The Supreme Court of Idaho has in two decisions held that the solicitation of orders by a foreign corporation with the orders to be shipped from outside of the state does not constitute doing business in the state. The first of these decisions is *Belle City, etc. Co. v. Frizzell,* 11 Ida. 1, 7; 81 Pac. 58, wherein the court said:

> "It is contended by counsel for appellant that although the respondent manufactured its machinery in the state of Wisconsin and simply took orders as above stated, for the sale of such machinery within the state of Idaho, that it comes within the pro-

visions of said act and cannot maintain this action. We cannot agree with counsel in that contention. The legislature never intended that that law should apply to foreign corporations except those actually engaged in business within the state, and excludes interstate commerce. And it was not intended to apply to interstate commerce between corporations or citizens of other states and citizens or corporations of this state. . . . . .

(p. 8) "So far as the transaction in the case at bar is concerned, it was simply and purely interstate commerce. The machine was manufactured in Wisconsin and shipped direct from the manufactory without the state as per said order to the appellant within the state of Idaho, or to M. J. Shields, to be delivered to the appellant. . . . . .

(p. 9) "If the legislature intended to apply the provisions of the law under consideration to facts such as those involved in the case at bar, it must be held unconstitutional as in violation of the commerce clause of the federal constitution. But we do not think the legislature intended to have it applied to transactions such as those involved in the case at bar; in other words, interstate commerce."

The next case is *Toledo Computing Scale Co. v. Young,* 16 Ida. 187, 191; 101 Pac. 257:

"Some question is raised in regard to the capacity of the plaintiff to transact business in this state until it has complied with the statutes regulating foreign corporations doing business within the state. There is nothing in this contention, for the reason

> that there is nothing in the record to show that it comes within the class of foreign corporations that must comply with the laws of this state in regard to filing its articles of incorporation, etc. The record shows that it is a foreign corporation engaged in interstate commerce. The order for the scale referred to in this action is dated at Rathdrum, Idaho, and addressed to the plaintiff at Toledo, Ohio, thus clearly indicating that it is engaged in interstate commerce, and not engaged in such business as would require it to comply with the laws of this state in regard to filing its articles of incorporation and appointing an agent upon whom service of process might be made."

The form of sales order used by defendant contains a statement that the order is subject to confirmation at its general office in Texas (p. 193). Accordingly, the act of acceptance took place in Texas. The Idaho decisions therefore indicate that solicitation of orders in Idaho, acceptance thereof in Texas, and filling of the orders by shipments from outside of Idaho does not constitute the doing of business in Idaho.

The Supreme Court has held to the same effect. In *Furst v. Brewster,* 282 U.S. 493, 496; 51 S.Ct. 295, 75, L.Ed. 478, the court said:

> "It appeared that Furst & Thomas did business at Freeport, Illinois, that they received at that place orders from the defendant, Brewster; and that the goods so ordered were shipped to Brewster at Warren, Arkansas, from the branch warehouse of Furst & Thomas at Memphis, Tennessee. ..... It

> was admitted that the corporation had not been authorized to do business under the laws of Arkansas (p. 497). These transactions were clearly interstate commerce. ..... The ordering and shipping of the goods constituted interstate commerce.''

The Idaho rule and the rule as announced by the highest United States Court are the same.

The facts in this case make the above decisions applicable and, accordingly, the solicitation and shipment of orders was interstate commerce and did not constitute doing business in Idaho.

The sending of so-called ''roller cars'' into Idaho, and diverting them after arrival in Idaho, was not the doing of business in Idaho. It is obvious that the interstate shipment is not completed until final delivery. No instance is given to show delivery and thus completion of the interstate shipment until delivery has been made to a customer. Delivery was never made to defendant. There is no claim that any of the cars were opened, and the diversion took place while they were still in transit as part of an interstate commerce transaction. In this case, the diversion of the ''rollers'' was in each instance made while still in the railroad cars as a part of an interstate commerce transaction. The diversion was an incidental act in such shipment, and was necessary to complete a sale.

The Supreme Court in *York Mfg. Co. v. Colley,* 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963, held that the interstate commerce feature of a transaction is not lost because incidental acts necessary to complete the same are

performed within the state, and that a seller was not doing business in the state where as a part of an interstate sale it sent its engineer into the state to install a refrigeration plant. The syllabus states briefly the doctrine of case as follows:

> "In an interstate contract for sale of a complicated ice-making plant, it was stipulated that the parts should be shipped into the purchasers' State and the plant there assembled and tested under the supervision of an expert to be sent by the seller. The purchasers agreed to pay him a per diem while so engaged and to furnish mechanics for his assistance, and their obligation to accept the plant was made dependent on the test. The erection took three weeks and the test a week more. *Held,* that these provisions as to the services of the expert were germane to the transaction as an interstate contract and did not involve the doing of local business subjecting the seller to regulations of Texas concerning foreign corporations."

The same rule applies here where in order to complete a sale it becomes necessary to divert an existing interstate shipment to some other point in the state. This is a vastly different situation than one where the goods come to rest in the state and are stored in a warehouse or otherwise. The rules in such cases obviously would not apply here. Any argument on such proposition, however, will be reserved for rebuttal if cases of that character are cited in plaintiff's brief. Accordingly, the practice with respect to roller-cars does not constitute the doing of business in Idaho.

The collection of accounts is not the doing of business in the state. If defendant had been in the business of loaning money apart from the extending of credit upon merchandise, a different rule might apply which need not be discussed because not material here. There are numerous decisions which could be cited to the effect that collection of accounts is not the doing of business in a state, but only one such case will be cited because it is authoritative and should be sufficient. In *Furst v. Brewster,* 282 U.S. 493, 498, 51 S.Ct. 295, 75 L.Ed. 478 the Supreme Court said:

> "Any state statute which obstructs or lays a direct burden on the exercise of the privilege is void under the commerce clause. .....
>
> "Accordingly, when a corporation goes into a state other than that of its origin to collect according to the usual or prevailing methods, the amount which has become due in transactions in interstate commerce, the State cannot, consistently with the limitation arising from the commerce clause obstruct the attainment of that purpose. .....
>
> (p. 499) "We are of the opinion that the provisions of the statute of Arkansas (requiring a foreign corporation to qualify), as applied in this case, are in conflict with the commerce clause."

In the instant case the occasions when accounts were collected by defendant's representatives in the state were few; there was no authorization shown in the representatives who came into Idaho to adjust or to make compromise settlement of accounts, and all that such representatives did was to receive checks, if they could get

them, which were not cashed by them but which were forwarded to defendant's principal office in Texas. Accordingly, the above rule applies and the collection of the accounts did not constitute the doing of business.

The retention of title to merchandise held on consignment is not the doing of business in the state. Under the evidence there is considerable doubt as to whether defendant retained title to any merchandise. The sales to its customers in the first place were outright sales, not conditional sales, nor sales on consignment. The customer was charged with the purchase price, and took the credit risk on resale. The merchandise was of a seasonal character, and if not sold during the fruit packing season, would not be sold until the season in the following year. In such case the customer received an extension of credit, and was not required to pay such portion of his account as was represented by such carry-over merchandise until the following season. The customer paid the insurance, storage and carrying charges, no instrument of conveyance or of mortgage was executed, and no agreement covering the situation could be found. If the price of the merchandise went up or down between seasons there was no evidence to indicate that the accounting would be made on the new basis. How settlement would be made in the event of a fire loss was not known, because no fire loss had ever occurred. It is doubtful if defendant had any title whatever in the merchandise. Certainly it would have had no title as against any creditors of the customer if the customer had become insolvent. The charge to the customer remained upon the defendant's books and the defendant attempted to exercise no acts of dominion over the mer-

chandise. It is, accordingly, doubtful if the title to the merchandise was in any person other than the customer. These circumstances do not contain the elements of a consignment nor of a title retention contract, but even if title were retained in defendant, and even if there were such a consignment contract, such retention of title to such merchandise held on consignment does not constitute the doing of business in the state. The leading case on this proposition is *Butler Bros. Shoe Co. v. U. S. Rubber Co.,* 156 Fed. 1, 19, (certiorari denied, 212 U. S. 577). This case is cited frequently and with approval in a great number of other cases. The Circuit Court of Appeals for the 8th Circuit in that case said:

> "Let us now turn to the contracts, observe what the rubber company agreed to do and what it actually did under them, and determine, if possible, whether or not in making or in performing these agreements its was guilty of doing any business within the meaning of the Constitution and statutes of Colorado. It agreed to ship the goods from its warehouse, or its mill, upon the orders of the appellee, to that company in Denver; and it did so. It contracted to do, and it did, nothing more. It never had any office or place of business in Colorado. It never received, stored, handled, or sold any goods, or collected any money for the sales of any goods, in that state under this contract. It never incurred, assumed, or paid any expenses of doing all these things, or of conducting any of the business. The shoe company had and maintained a place of business in Colorado, it rented or owned the place in which the business in Colorado was done, and it

agreed to bear all the expenses and losses of receiving, storing, and selling the goods; and it did so. The purchasers of the goods were purchasers from it, solicited and secured by it. They were its customers, and liable to it for the purchase price of the goods. The goods were billed to them in the name of the shoe company as consignee. The profits of the business and the work of the business, the labor of receiving, storing, and selling the goods, were the shoe company's. The profits constituted its factorage, its compensation, for carrying on the business. There is no question here between the state and the shoe company, or between the shoe company and the purchasers of the goods, or between the rubber company and the purchasers of the goods. The question here is between the consignor and the factor, and it is whether the consignor, which did not agree to do, and did not in fact, do the business of receiving, storing, and selling these goods, or the factor who did contract to do, and did actually do, the business of receiving, storing, and selling these goods, in Colorado, and who received the factorage therefor, was doing that business. In a simple transaction the true answer seems clear. A farmer sends to a commission merchant in a city a dozen barrels of apples for him to sell. The factor puts them in this store, sells them, received the proceeds, and remits them, less his factorage. The farmer from time to time sends 1,000 barrels during the season, and they are sold and the proceeds are remitted in the same way. The farmer is not carrying on the business of selling

apples in the city, but the factor is. The transaction in hand is larger, but in every element which conditions its legal character and effect it is not different. The transaction between the parties to this suit was interstate commerce. The rubber company did not agree to do, and did not actually do, any of the business of receiving, storing, and selling the good in Colorado. The shoe company did agree to do, and did do, that business. These facts have driven our minds with compelling force to the conclusion that, within the true intent and meaning of the Constitution and statutes of Colorado, the rubber company was not doing business in that state, and the contracts between these litigants are valid and enforceable."

Among the cases where this decision was cited with approval was *Furst v. Brewster,* 282 U.S. 493, 51 S. Ct. 295, 75 L.Ed. 478, already cited above. At any rate, this decision remains the law and its doctrine has not been overruled, but is well established and settled.

There is some evidence that insurance on this allegedly consigned merchandise was carried in the name of defendant as well as of the customer. This would not alter the rule. In *Three States Buggy Co. v. Kentucky,* 32 Ky. L. 385, 386, 105 S.W. 971, the court said:

"We construe this contract as not appointing Walker & Brent as agents of the appellant, but as providing for a series of sales to them upon the credits and terms stipulated in the writing. It will be observed that Walker & Brent do not take any goods they do not want. They buy them at the

wholesale prices fixed by appellant, if agreed to by the local firm. They take them at Cairo, on board of cars, at their risk, and ship them to Bardwell at their expense. There they place them in their own store, sell them on such terms and at such prices as they can. The proceeds of the sale belong to Walker & Brent. If the goods should be lost or destroyed in transit or at Bardwell, or if the sales were made upon uncollectible credits, the whole of the loss would fall upon Walker & Brent. The unusual features of the transaction from which it is argued that the contract constitutes an agency are the stipulations as to credits, the agreement of appellant to take back the unsold goods, and the clause relating to insurance. But these features pertain alone to the time and manner of payment for the goods sold to Walker & Brent. The agreement to take back unsold goods is a provision, in effect, for their resale by Walker & Brent to appellant; but even then Walker & Brent must be at the risk and cost of delivering the goods at Cairo, Ill., in as good condition as they were received by them. The insurance clause is not inconsistent with either construction, but we think it is in the nature of surety as used in this instance. An agency such as the commonwealth contends existed under this contract would leave the title of the goods in appellant, with the right in it to recall them or withdraw them at any time, and to control their retail prices and terms of sales to consumers. This right it has not under the contract. Nor would the goods of Walker & Brent under this contract be subject to

levy and sale for the debt of appellant. An action of replevin, detinue, or trover concerning them would have to be brought in the name of Walker & Brent, not appellant.

"We conclude that appellant was not in this transaction carrying on business in this state within the contemplation of Section 571, Ky. St. 1903."

To the same effect is *Cooper Rubber Co. v. Johnson,* 133 Tenn. 562, 564; 182 S.W. 593:

"The first and main defense of the sureties is that the complainant rubber company had not complied with our foreign corporation acts, and was doing business in this State through the agency of the tire company; therefore that it may not maintain the suit because of the failure to so comply. This defense was sustained by the chancellor.

"The contract between the two companies is in character one of consignment of merchandise for sale, unless one or more of its provisions later to be set out, relied on by appellee as so doing, mark it as one governing the parties as principal and agent—the tire company as agent through which the rubber company did business in this State. .....

(p. 567) "While in one sense a factor or commission merchant is the agent of the consigning dealer or manufacturer, he does not conduct an agency or business for the latter at the place of business of the former, where the sales of the consigned merchandise are made to customers chosen by the local dealer, at his own risk, and the proceeds of the sale do not be-

come the exclusive property of the consigning company. A business so conducted is truly said to be that of the factor or commission merchant. .....

(p.568) "The power to insure the goods placed in his hands is one of the ordinary powers of a factor or of one selling on commission, imposable by contract or usage on the factor as such. 1 Mechem on Agency (2d Ed.), sec. 2521; 12 Am. & Eng. Enc. L. (2d Ed.), 656; *Wasey v. Whitcomb,* supra. Manifestly the provision had relation to and was in furtherance of the duty to care for, and in certain circumstances to return, the goods. The cost of the insurance was to be paid by the local dealer, not by the rubber company through it. .....

(p. 570) "We are of the opinion that the several defenses urged by the appellee are not maintainable, and that the chancellor erred in not decreeing in favor of the rubber company."

Even if the facts in this case showed the retention of title by defendant to goods held on consignment in Idaho, such fact would still not constitute the doing of business in Idaho.

The facts relative to the land held as security do not constitute the doing of business in Idaho. The merchandise for which the debt was contracted was shipped not by defendant but by the Basket Sales Company. The debt thus incurred was later secured by a mortgage upon Idaho real estate given not to defendant but to defendant's President as an individual. No entry was made on defendant's books, and defendant had no interest in the security. The mortgagor executed a document which in

effect constituted an assignment for the benefit of his creditors, or more properly, the giving of security upon his equity to a Trustee for the purpose of securing his creditors. The Trustee was the father of defendant's salesmanager but never was employed by, and never was a representative of defendant. Even if defendant were interested in the property and operated the orchard property, it would not constitute the doing of business. The general rule is found in *Sillin v. Hessig Ellis Co.*, 181 Ark. 386, 390; 26 S.W. (2d) 122, wherein the court said:

> "These authorities also sustain the principle of law that a foreign corporation has a right to take a mortgage and to foreclose it for the purpose of collecting its account resulting from interstate commerce without complying with the laws of the state regulating the admission of foreign corporations for the purpose of doing business within the state. The underlying principle is that if the indebtedness was incurred in transactions growing out of interstate commerce, the foreign corporation could come into the state and collect its debts, and that such act would not amount to doing business in the state. . . . .
>
> (p. 391) "Again, the record shows that appellee purchased at two different places in the state of Arkansas a stock of drugs for the purpose of collecting its debt against a retail drug store. In each instance, it only operated the drug store until it could dispose of the stock of drugs and thereby collect its debt. This, as we have already seen, was a mere incident to the collection of the debt and

did not constitute doing business within the state. In each of the instances cited above the buying in of the stock of drugs by appellee was for the purpose of collecting an account resulting from an interstate transaction, and the practice complained of did not involve doing business in the state which would subject appellee to the regulation of the state concerning foreign corporations. This court has expressly held that our statute prohibiting foreign corporations from doing business in this state without complying with its terms does not prohibit such corporations from taking a note or mortgage to secure a past-due indebtedness for goods sold in interstate commerce."

The property consisted of an orchard upon which fruit was grown. The record does not state that baskets manufactured by defendant were used in the marketing of the crop but assuming such to be the case the extension of credit for merchandise purchased in interstate transactions, is not the doing of business in the state. In *Yarborough v. Gage,* 254 Mo. 1145, 70 S.W. (2d) 1055 wherein the syllabus correctly expresses the doctrine of the case in the following language:

"Where Tennessee cotton factor advanced money to Missouri cotton dealer under trust deed and cotton contract, credit being extended in consideration of agreement to ship cotton to Tennessee to be handled by factor, transaction constituted 'interstate commerce,' and hence notes and trust deed were valid and enforceable in Missouri notwithstanding factor had not complied with statute pre

scribing conditions under which foreign corporation may do business in state."

There is no theory under which the facts relative to the taking of security upon the land constituted the doing of business in Idaho.

As above shown, the solicitation of orders to be filled by shipment from outside the state, is not doing business in the state, and this rule is applicable even though some of the shipments are diverted in transit; the collection of accounts for merchandise theretofore shipped in interstate commerce is not the doing of business; the facts in this case do not show that title to any merchandise was retained by defendant, but even if so, it merely constituted merchandise shipped on consignment and does not constitute doing of business; nor do the facts relative to the Idaho land establish any onership or interest in the land, and they do not constitute the doing of business in Idaho.

Since the defendant was not doing business in Idaho it did not waive its privilege of objecting to the venue of the action in Idaho, and since the District of Idaho was the residence of neither the plaintiff nor the defendant, the motion to dismiss on the ground of improper venue should have been granted.

SERVICE WAS NOT PROPERLY MADE UPON DEFENDANT.

The Idaho Code, 5-507, states:

"The summons must be served by delivering a copy thereof as follows. . . . .

"2. If the suit is against a foreign corporation

> ..... doing business and having a managing or business agent, cashier, or secretary within this state, to such agent, cashier or secretary, or to ..... any other agent of said corporation."

The provision for service of summons applies only to a foreign corporation which is "doing business". The "doing business" is an essential element before any of such persons becomes a proper person upon whom to make service of summons. Accordingly, regardless of whether or not the salesmanager would have been a proper person had the defendant been doing business in Idaho, service was improperly made upon him because there was no authority for serving any person unless the defendant were doing business. As above shown, the defendant was not doing business in Idaho, and service upon any person would would have been improper and, accordingly, the motion to quash the service of summons should have been granted.

SUMMARY

I. Where there is a discrepancy or uncertainty in the facts, the position most favorable to the party against whom a summary judgment is sought to be entered must be accepted as true.

   A. *McElwain v. Wickwire Spencer Steel Co.,* 126 F (2d) 210, 211.

II. The doing of business in a state without qualifying as a foreign corporation does not constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in such state.

A. The rule of *Neirbo v. Bethlehem Shipbuilding Corporation,* 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed. 167 applies under the facts of that case only to situations where

1. Claim for relief arises or is to be performed in the state, and

2. There is an express waiver by qualifying and designating an agent.

B. But where these situations do not exist, the right to object to improper venue is not waived.

1. *In re Keasbey and Mattison Co.,* 160 U.S. 221, 231; 16 S.Ct. 273, 40 L.Ed. 402.

2. *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8, 22; 27, S.Ct. 236, 51 L.Ed. 345.

III. Defendant was not doing business in Idaho at the time the alleged claim arose or at the time of the commencement of the action.

A. The solicitation in Idaho of orders to be confirmed outside of Idaho and filled from shipments to be made from outside of Idaho, does not constitute doing business in Idaho into which the goods are shipped.

1. The law of Idaho is controlling

a. *Erie R. R. Co. v. Tompkins,* 304 U.S. 64, 78; 58 S.Ct. 817, 82 L.Ed. 1188.

2. The decisions of Idaho support this proposition.

a. *Belle City, etc., Co. v. Frizzell,* 11 Ida. 1, 7; 81 Pac. 58.

b. *Toledo Computing Scale Co. v. Young,* 16 Ida. 187, 191; 101 Pac. 257.

3. *Furst v. Brewster,* 282 U.S. 493, 496; 51 S.Ct. 295, 75 L.Ed. 478.

B. The sending of so-called "roller" cars into Idaho and diverting them after arrival in Idaho was not the doing of business in Idaho.

1. The interstate character of a transaction is not lost, because incidental acts necessary to complete the sale are performed in the state.

1. *York Mfg. Co. v. Colley,* 247 U.S. 21, 38 S. Ct. 430, 62 L.Ed. 963.

C. The collection of accounts is not the doing of business in the state.

1. *Furst v. Brewster,* 282 U.S. 493, 498; 51 S. Ct. 295, 75 L.Ed. 478.

D. The retention of title to merchandise held on consignment is not the doing of business in the state.

1. *Butler Bros. Shoe Co. v. U. S. Rubber Co.,* 156 Fed. 1 (certiorai denied 212 U.S. 577).

a. Which case was approved in *Furst v. Brewster,* 282 U.S. 493, 498; 51 S.Ct. 295, 75 L.Ed. 478.

2. Even where insurance is carried for benefit of consignor.

a. *Three States Buggy Co. v. Kentucky,* 32 Ky.L. 385, 386; 105 S.W. 971.

b. *Cooper Rubber Co. v. Johnson,* 133 Tenn. 562, 564; 182 S.W. 593.

E. The facts relative to the land held as security does not constitute the doing of business in Idaho.

1. Even if defendant were interested in property as means to collect a debt.

a. *Sillin v. Hessig-Ellis Co.,* 181 Ark. 386, 390; 26 S.W. (2d) 122.

2. Even if security were given as part of arrangement for extension of credit.

a. *Yarborough v. Gage,* 254 Mo. 1145, 70 S.W. (2d) 1055.

IV. The sales manager of defendant, although served in Idaho was not a proper person upon whom to serve process.

A. Statute permits service only if foreign corporation is doing business in state.

1. Idaho Code Title 5, sec. 507.

B. As above shown defendant was not doing business.

CONCLUSION

It has been shown that even if the defendant were doing business in Idaho nevertheless the District of Idaho is not the proper district for the commencement of the action, and the doing of business by defendant does not constitute a waiver of its right to object to improper venue.

It has been further shown that under the facts of this case, defendant was not doing business in Idaho. It has been further shown that service was not properly made upon the defendant. The privilege of objecting to improper venue not having been waived; the objection seasonably made and raised at every stage of the proceedings was good; the motion to dismiss should have been granted on the ground that the District of Idaho was not the proper place for bringing the action, and on the ground that service was improperly made upon defendant. The motion for summary judgment for like reason should have been overruled, and it was error to enter the final judgment.

The judgment should be reversed and the cause remanded to the trial court with instructions to vacate the judgment, deny the motion for summary judgment, and grant the motion to dismiss.

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